APPEAL NO. 031889
FILED SEPTEMBER 2, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on June 23, 2003. The hearing officer resolved the disputed issue by deciding that the compensable injury of _____, does not include an aggravation of the appellant's (claimant) preexisting degenerative disc disease of the cervical spine. The claimant appealed, arguing that there was no evidence that there had been specific treatment for cervical disc disease prior to the date of the compensable injury and that the MRIs in evidence show the acceleration and aggravation of the degenerative disc disease after the date of the compensable injury. The respondent (carrier) responded, urging affirmance and objecting to the new information contained in the appeal which was not offered into evidence at the CCH.

DECISION

Affirmed as reformed.

The carrier contends in its response that the claimant included information in his appeal in a section entitled "Additional Information Pertinent to this Case" that was not offered into evidence at the CCH. We agree. In determining whether the hearing officer's decision is sufficiently supported by the evidence, we will generally not consider evidence that is offered for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not find that to be the case with the additional information included in the claimant's request for review, which was not offered into evidence at the hearing. Accordingly, we decline to consider this additional information on appeal.

A review of the record reflects that the parties stipulated that the claimant sustained a compensable cervical injury. We reform Finding of Fact No. 1.B. to read that on _____, the claimant sustained a compensable cervical injury. At issue was whether the compensable injury included an aggravation of the claimant's preexisting degenerative disc disease of the cervical spine. It was undisputed that the claimant had a long-standing history of cervical disc problems. While the hearing officer was persuaded that the incident of _____, caused a recurrence of symptoms of the claimant's degenerative cervical disc disease, he was not persuaded that the incident of _____, caused either a worsening or acceleration of the preexisting degenerative disc disease or caused additional damage to the claimant's

cervical spine. In Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, the Appeals Panel noted that to prove an aggravation of a preexisting condition there must be some enhancement, acceleration, or worsening of the underlying condition from the injury and not just a mere recurrence of symptoms inherent in the etiology of the preexisting condition. *See also* Texas Workers' Compensation Commission Appeal No. 011280, decided July 25, 2001.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence and determine what facts have been established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

We affirm the decision and order of the hearing officer as reformed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

MICHAEL R. PAYNE, SUPERINTENDENT
8960 FM 13
PRICE, TEXAS 75687.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Robert W. Potts
Appeals Judge